

Canadian GamingLawyer

SHAPING THE FUTURE OF CANADIAN GAMING LAW

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INTO THE WEEDS

**HOW CANADA'S CANNABIS
REGIME CAN HELP WITH THE
LEGALIZATION OF SINGLE-EVENT
SPORTS-BETTING**

**On the Hunt for
Canadian Gaming
Bigfoot**

**Nevada Gaming
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Under Siege**

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Treaty**

MESSAGE FROM THE PRESIDENT



We are pleased to announce that the IMGL 2019 Spring Conference in New Orleans was a tremendous success. Kelly Duncan, John Maloney and Donna More put together a great program of topical interest to gambling law professionals and other gambling industry stakeholders.

I would like to once again thank our keynote speakers, Tim Wilmott of Penn National and Ronnie Jones, the Chairman of the Louisiana Gaming Control Board, who we were honoured to have join us. In addition to the keynote presentations, there was a considerable number of panels on topics highly relevant to the gambling sector, including eSports; Sports League Entitlements in the context of sports betting; Gaming, Elected Officials and the Media; Sports Betting – Lessons

from Europe and Card Rooms and Tribal Gaming. Further, there were a number of discussion panels covering issues such as “Sexism in the Gaming Industry” and “the Wire Act.”

There were also a number of social events including our Gala Dinner at the renowned Brennan’s (sponsored by Fox Rothschild), our Welcoming Event at the Windsor Court Hotel (sponsored jointly by GLI and Spectrum) and our Closing Reception at the Tableau (sponsored by Jones Walker). Indeed, I would like to thank all of the sponsors of the New Orleans conference and particularly Konami for their continued support as our Platinum sponsor.

As for upcoming events, I would like to remind you of our Autumn 2019 conference, which is taking place in Munich from 11 to 13 September 2019. The Munich conference committee (led by Wulf Humbach) is arranging a fulsome conference to be held at the famous Charles Hotel. Registrations for both accommodation and the Conference are available at imgl.org.

Also, please note 1-3 April 2020 in your diaries for the IMGL 2020 Spring Conference which is to take place in Athens. Plans are well underway. Suffice it to say, IMGL has chosen Athens as a venue that will be a first for IMGL and will be a very attractive destination for our members and their guests.

*Best Wishes,
Jamie Nettleton, President*

Canadian GamingLawyer

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BY MICHAEL D. LIPTON AND CHANTAL A. CIPRIANO

Into the Weeds

How Canada's cannabis regime
can help with the legalization of
single-event sports betting



The odds may be tilting in favour of the legalization of single-event sports betting in Canada. Despite the existence of parlay bets, Canada's long-standing federal restriction on single-event sports betting continues to run afoul of an evolving sports landscape and the demands of increasingly savvy bettors. Yet, with the dawn of the Information Age, the shifting legal sentiments of our southern neighbour and a growing black market of domestic and offshore sports bookies, Canada remains laggard when it comes to its betting market.

This article will delve into these unanswered questions and will suggest that the Canadian federal government must reform and modernize the current antiquated gaming and betting provisions of the Code, which are both unfair to sports bettors and inconsistent with the modern gaming industry. Such federal reform will allow the provincial governments to update their gaming regulatory regimes to better meet the changing landscape of gambling in Canada. Further, Canada's reluctance to legalize head-to-head betting is at odds with its recent legalization of recreational cannabis, a substance historically prohibited and treated, in the eyes of many, much worse than gambling. To level the playing field, this article explores how Canada can modernize its antiquated betting provisions in much the same way as was recently implemented with recreational cannabis.

Single-Event Sports Betting in Canada

The Criminal Code of Canada (the "Code"), which sets out the parameters of legal gaming in Canada, prohibits betting on a single sporting event or athletic contest under section 207(4)(b). Predicated upon fears of match-fixing and the social problems associated with gambling, the Canadian ban on single-event sports betting has remained in place since offshore internet gambling became a reality over 20 years ago. For this reason, provincial gaming corporations require customers to bet on a minimum of two or more sporting events, otherwise known as a parlay bet. Despite the publicized betting odds, parlay betting has been coined a sucker's bet since players must correctly predict the outcome of all of the events in order to win. As a result, educated bettors drawn to the flexibility and simple odds of single-event sports betting instead opt for the services offered by offshore operators and illegal bookmakers to satiate their sports gaming appetite.

Widespread throughout all socioeconomic strata of Canadian society, single-event sports betting is big business, and it is finally gaining some much needed attention in Ontario. The recent 2019 Ontario Budget tabled by the Progressive

Conservatives encourages the federal government to reconsider the types of gambling activities permitted in the province, to include single-event sports betting. According to the Ontario Budget, the people of Ontario spend approximately \$500 million per year gambling online, with \$110 million allotted to single-event sports betting, all conducted on illegal websites or by way of other illegal offerings. The Ontario Budget highlights that "it is time to usher Ontario out of the gambling prohibition era and treat the people of Ontario as adults by allowing them to bet on the outcome of a single sporting event."

Going Head-to-Head with Cannabis

The inability of section 207(4)(b) of the Code in preventing Canadians from engaging in single-event sports betting has not gone unnoticed. In the last ten years, federal lawmakers have twice considered amending the Code, but to no avail. Most recently, NDP MP for Windsor West, Brian Masse, attempted to repeal section 207(4)(b) of the Code through *Bill C-221, The Safe and Regulated Sports Betting Act*.

Bill C-221 — the brevity of which matched the ease of its legislative implementation — proposed to provide provincial governments with the option of permitting single-event sports betting and, if so permitted, the choice of operating the bets by telephone, Internet and/or land-based locations. Proponents argued that Bill C-221 would not only create employment opportunities in the Canadian gaming industry but also stymie organized crime operations linked to illegal bookmakers. Despite garnering broad cross-party support, Bill C-221 ultimately met the same fate as its predecessor Bill C-290 and was defeated in the House of Commons in September 2016. Opposition to the various private members' bills was based in part on the misconceptions that head-to-head betting would worsen gambling addiction among vulnerable groups in Canada and open a Pandora's box of match-fixing, undermining the integrity of sport.

The Canadian federal government's position on single-event sports betting is, even more troublingly, seemingly at odds

with its recent legalization of recreational cannabis. Cannabis, like gaming, was historically banned because of its perceived links to criminal activity and immoral behavior. Interestingly, in both cases, the prohibition regime has failed. Confronted by a "system of marijuana prohibition that does not work," the push for cannabis legal reform spearheaded the successful 2015 election campaign of the Liberal Party of Canada. Following the 2015 electoral win, Prime Minister Trudeau cited two principles for the legalization of cannabis: to minimize underage access to cannabis and to reduce criminal activity surrounding its illegal trade.

This policy rationale is entirely applicable to the legalization of single-event sports betting. Much like cannabis, the underground market of single-event sports betting has long been shielded from liability under a three-decade-old law that, ironically, was originally intended to restrict, rather than expand illicit gambling activities. Canada's newfound stance on cannabis signifies the government's power to amend the law where prohibition has failed to achieve the goal of protecting the public interest. Arguably, the proliferation of organized crime activity alongside the millions of dollars in tax revenue that pour out of the Canadian economy inevitably begets the need for a modernized approach to head-to-head betting.

Third Time is a Charm?

It may be time for members of Parliament to attempt, for a third time, to table a bill allowing for single-event sports betting. In the past few years, we have witnessed the legal reform of cannabis in Canada gain unprecedented traction as the global shift towards the legalization of recreational cannabis simultaneously emerged. Unlike cannabis, however, Canada's gaming laws sit frozen in time while the international sports betting industry undergoes a major upheaval.

An indicator of the prominence of single-event sports betting is the U.S. Supreme Court's recent decision to strike down the *Professional and Amateur Sports Protection Act* (PASPA) — a law that barred U.S. states from enacting laws that

effectively promoted any kind of sports betting. With the repeal of PASPA, U.S. states are now able to enact laws that legalize and regulate all forms of sports betting. In addition to the uncaptured online betting market, the sports betting landscape south of the 49th parallel will only make it more difficult for Canada's gaming industry to compete. In the wake of the U.S. sports industry stepping out of the shadows and millions of dollars flowing through new U.S. sportsbooks, some Canadian politicians, including the government of Ontario as reflected in the Ontario Budget, and sports leagues have again placed the spotlight on the federal government to modernize the Code by permitting single-event sports bets.

Levelling the Playing Field: Lessons

Gleaned from Canada's Cannabis Regime

Despite being slow to play its cards, Canada can still gain a second-mover advantage by learning from U.S. states, such as Nevada, that has both successfully introduced the legalization of recreational cannabis and offers single-event sports betting. Akin to the legalization of cannabis, the repeal of section 207(4)(b) of the Code would task the provincial and territorial governments, albeit on a smaller scale, with creating their own regulatory framework. Head-to-head betting in Canada, much like with cannabis, could be provincially regulated through three different models. One, the government-run model; two, the request-for-proposal model; or three, the free market model (provided the Code is amended to permit a tax and regulate the type of licensure regime).

In practice, provincial governments that adopt the government-run model would enact streamlined legislation permitting their respective lottery and gaming corporations to conduct and manage single-event sports betting. Another option available to the provinces is the request-for-proposal model, which provides regulators with significant control over licensees but enables lottery corporations to conduct and manage the single-event sports betting. It appears from the Ontario Budget that the Ontario government is considering

“If Canada keeps dragging its heels, illegal bookmakers will win — pun intended.”

this model in relation to online gaming. As noted in the Ontario Budget, the government of Ontario intends to consult with stakeholders to develop a market that “reflects consumer preferences, fosters an exciting gaming experience and minimizes the burden on business while ensuring appropriate protections are in place.”

The first two models, however, raise the important corollary issue of whether provinces are well-equipped to achieve a successful single-event sports betting regime given Canada's newfound need to move quickly. We recently learned from the Canadian cannabis regime that the shortage of the federal supply of cannabis — stemming largely from a limited number of federal licenses granted due to overly cumbersome regulatory approvals — has resulted in a lingering black market. Arguably, the same effect will likely occur with single-event sports betting should provincial models fail to foster a betting market that provides players with the sports betting offerings to which they have grown accustomed.

Alternatively, provinces that adopt the free market model could develop a regulatory scheme for the registration and licensing of private entities seeking to offer single-event sports betting. This model would effectively eviscerate the existing monopoly of the provincial lottery corporations. If such amendment to the Code is enacted, as seen with Ontario's cannabis retail regime, the regulatory hassles of developing a licensing regime in an infant industry may make the free market model a somewhat unattractive option. Nevertheless, these regulatory challenges are arguably offset by the long-term benefits of an open market, namely, the promotion of competition to offer the best products and services while also releasing the pressure on

provincial governments to conduct and manage sportsbooks in a nascent industry in which they have little experience.

Going the Distance

Should Canada seek to enter this billion-dollar market, it will need to undercut illegal bookmakers. But if Canada keeps dragging its heels, illegal bookmakers will win — pun intended. It is therefore essential that the approach taken by the provinces not only promotes high-calibre service providers but also encourages economic and development efficiencies to the benefit of players. Gaining a competitive edge on illegal and offshore bookmakers is therefore best effected by way of a truly free market. Provinces must also consider whether single-event sports betting, if legalized, will be restricted to land-based locations.

While it remains to be seen what will happen next, it is certain that the shifting legal tides in the sports-betting landscape worldwide are bound to have ripple effects throughout Canada. With the growing disconnect between public sentiment and sports betting offerings, alongside increasing political pressure to move quickly, industry players and bettors alike are hopeful that the legalization of single-event sports betting in Canada will finally be the consensus pick. **CGL**

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We would like to thank our articling student, Era Saraci, for her contribution to this article.

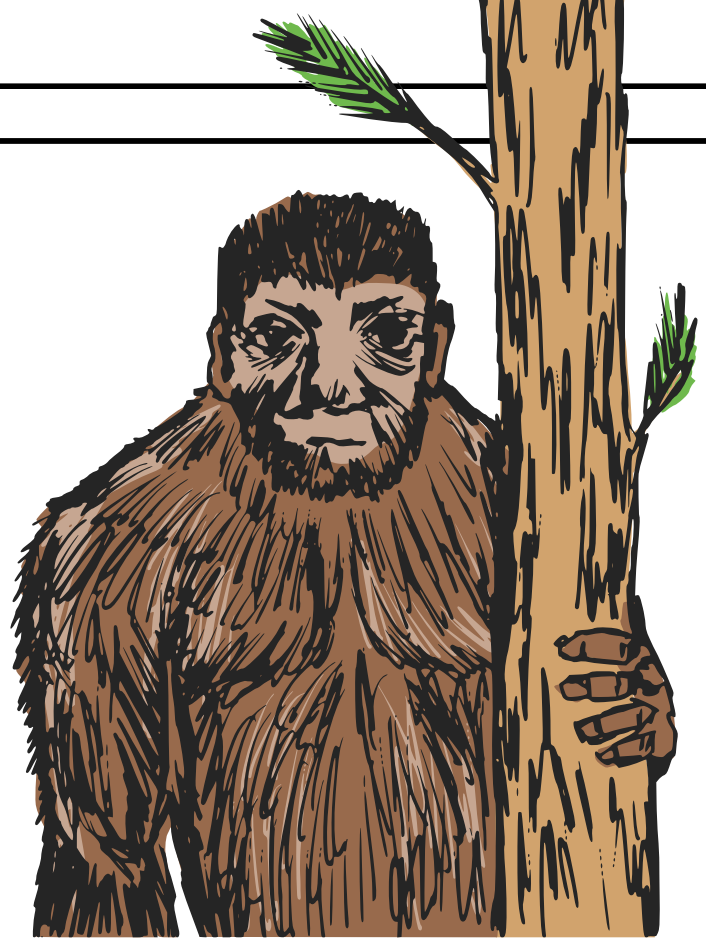


BY JACK TADMAN

On the Hunt for Canadian Gaming Bigfoot

Quasi-gambling games of skill in Canada

The television series “Finding Bigfoot” follows the four members of the Bigfoot Field Researchers Organization as they search for evidence in support of Bigfoot.¹ After nine seasons, ninety episodes, and two spin-offs², the Bigfoot Field Researchers Organization has yet to find convincing evidence of Bigfoot’s existence.



In the Canadian gaming field, we have our own Bigfoot. Part of Canadian gaming folklore, this “Canadian Gaming Bigfoot” is a game that appears to be quasi-gambling but is actually a game of skill. There have been many claims of Canadian Gaming Bigfoot sightings, but these claims are either untested (e.g., daily fantasy sports, penny auctions), or upon closer inspection and a review of the evidence (i.e., by a Canadian court), determined by courts to be either a game of chance or mixed chance of skill (i.e., not Canadian Gaming Bigfoot). In May 2018, after years of searching, Canadian Gaming Bigfoot may have been found: the GotSkill game described in *Play For Fun Studios Inc. v. Registrar of Alcohol, Gaming and Racing*.³

What is GotSkill?

GotSkill is a game played for real-money on a video terminal with a touchscreen. It is found in bars and

other establishments throughout Ontario.

Like a slot machine, GotSkill has a reel display that spins to reveal prizes. However, unlike a slot machine, a player is given information about the potential next win of the machine. Using information about the potential next win of the machine, the player chooses whether or not to play. If the player chooses to play, the game proceeds through two stages.

The first stage is known as the “amusement phase.” In the “amusement phase” onscreen animations resembling a slot machine (reels) are presented to a player. If the potential win is not zero, the animation reveals a winning line combination or scatter pay.

The second stage is known as the “skill task.” The skill task consists of a cursor moving back and forth at a constant speed across an area with 21 bars. Each bar is assigned a percentage value of between 55% and 110%. Once

the player presses the “stop button,” the cursor stops moving. The challenge is to stop the cursor as close to the middle of the area as possible. The closer the cursor is to the middle when it stops, the greater the percentage. If the player stops the cursor in the middle of the area, the player receives 110% of the player’s win during the amusement phase. The outcome of the skill task depends entirely on the player’s hand-eye coordination. Once the game is complete, the player’s “actual win” is the product of the percentage value obtained on the skill task and the amount won during the amusement phase.

It was not disputed by the parties in *Play for Fun* that the “skill task” component of GotSkill is dependent solely on skill and not chance.

A Game of Skill

Avid readers of Canadian Gaming Lawyer know that a “game” for the

purposes of the Canadian Criminal Code means a game of chance or a game of mixed chance and skill; “chance” means the “systematic resort to chance involved in many games such as the throw of dice and the deal of cards” and is distinguished from “the unpredictables that may occasionally defeat skill;”⁴ and in order for an activity to be a “game” under the Code, players must have a chance to both win and lose money or money’s worth.

Below are additional principles that Canadian courts have identified as requirements for a game to be considered a game of skill:

- Any chance present in a game must not be introduced for the purpose of defeating skill;⁵
- Players must control the game and not be at the mercy of a machine where skill is not the only element;⁶ and
- Systematic chance must not only be missing from the gameplay, but must also be missing from the awarding of prizes.⁷

The Play for Fun Decision

For most of the *Play for Fun* decision, it appeared that the court would hold that GotSkill was, in substance, a game of chance or mixed chance and skill. Justice Schreck rejected the argument of Play for Fun Studios that GotSkill should be considered from the perspective of placing a single wager. Under this interpretation, the player knows how much he or she stands to win or lose before deciding to play

and wins or loses an amount of money depending entirely on her skill in completing a skill task.⁸

Instead, Justice Schreck agreed with the Registrar of Alcohol, Gaming, and Racing (the “AGCO”). The AGCO took the position that GotSkill should be considered from the perspective of how it would be played by an ordinary person. (i.e., multiple times during a playing session in order to see the potential next win for each wager). From the player’s perspective, the potential next win is unknown, and is the result of chance. This element of chance is what induces players to keep playing.⁹

“However”

In a plot twist that would surprise the most seasoned bibliophile, Justice Schreck began the next paragraph with the word “however” and went on to write that that “the fact that some elements of the game are out of the player’s control does not necessarily make GotSkill a game of mixed chance and skill.”¹⁰ The court accepted that a player who is able to continuously obtain 110 per cent on the skill task would ultimately win more than he or she lost.¹¹ In other words, if a player has the skill to obtain 110 per cent on the skill task a certain percentage of times, GotSkill will return, on average, more than 100 per cent to the player. Based on this fact, Justice Schreck held that “the player who has enough skill can ‘beat’ the machine, so the machine cannot ‘defeat the ability of the player to obtain favorable results’”¹² Therefore, according to Justice

Schreck, GotSkill is not a game of chance or mixed chance and skill and is not prohibited by the Code.

Discussion

If *Play for Fun* is ultimately accepted as good law, our understanding of what constitutes a game of skill in Canada will be clarified to include games which include elements of chance, but if played properly by a player exercising skill and control, offer a return to the player of more than 100 per cent.

There is inherent difficulty in establishing a skill task that will be acceptable from both a business and legal perspective. If a skill task is too easy, and a game could potentially return more than 100 per cent to a player, the game may not be financially viable. If a player obtaining a return of more than 100 per cent is unreasonably hard, due to a task being so challenging that the player is no longer in control of the machine, or if a player is required to complete the skill task at a near perfect rate, or if the court decides that a maximum return to player (e.g., 100.1 per cent) is subterfuge, a game may not be legally viable.

The AGCO has already filed a Notice of Appeal with the Ontario Court of Appeal. The appeal will be heard on June 18, 2019.¹³ In the meantime, Play for Fun Studios appears to have found the best evidence to date of Canadian Gaming Bigfoot. **CGL**

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1. Explainer for our non-North American readers: Bigfoot, also known as Sasquatch, is part of North American folklore, and is a hairy, upright-walking, ape-like animal which is between 6 and 9 feet.

2. The two spin-offs are *Finding Bigfoot: Further Evidence* and *Finding Bigfoot: Rejected Evidence*.

3. 2018 ONSC 5190 [hereinafter *Play for Fun*].

4. *R. v. Ross et al.* (1968), 70 D.L.R. (2d) 606, [1968] S.C.R. 786, 1968 CarswellOnt 16 (S.C.C.), [hereinafter *Ross*]. At issue in *Ross*

was whether contract bridge is a game of skill, chance, or mixed chance and skill.

5. *Ibid.* at 791.

6. See, e.g. *McGarey v. R* (1974), 19 C.R.N.S. 82, 6 C.C.C. (2d) 525 (S.C.C.).

7. *R. v. Topechka* 34 W.W.R. 97, [1960] S.C.R. 898.

8. *R. v. Quiz-It Trivia Inc.* (1989), 4 C.R. (4th) 234.

9. *Supra* note 3 at para 27.

10. *Ibid.* at para 28

11. *Ibid.* at para 38. This principle is set out in *R. v. Balance Group International Trading Inc.* (2002), 162 C.C.C.(3d) 126 (Ont.C.A.) at para. 3.

12. *Ibid.* at para 39.

13. Info Bulletin No. 92: Got Skill Game in Licensed Establishments: UPDATE – AGCO to Ontario Court of Appeal – June 18, 2019, February 25, 2019. Retrieved on March 20, 2019 at <https://www.agco.ca/bulletin/2019/info-bulletin-no-92-got-skill-game-licensed-establishments-update-agco-ontario-court>



BY KATE C. LOWENHAR-FISHER, JENNIFER J. GAYNOR AND GREGORY R. GEMIGNANI

Nevada Gaming Legislation Update

It has been a rollercoaster of a year for Nevada gaming regulators, with multiple changes at the Nevada Gaming Control Board (“Board”) and Nevada Gaming Commission (“Commission”), including the appointment of a new chair of the board, Sandra Douglass Morgan, in January by new Nevada governor Steve Sisolak. Chair Morgan had been a member of the Commission since April of 2018. Governor Sisolak has to announce a replacement for Chair Morgan’s now-vacated seat on the Commission.

In March, however, he appointed Phil Katsaros, an executive with Certus Gaming USA, and a former agent in the tax and license division of the Board, to fill the Board seat vacated by Shawn Reid, whose term expired at the end of January 2019.

Despite the turnover, Chair Morgan and the other remaining members of the Board and Commission are facing head-on the task of working with Nevada’s legislators to update Nevada’s gaming laws in the 2019 Nevada legislative session, which runs February-June of this year.

Here is a summary of the key gaming bills currently pending in the Nevada legislature:

Senate Bill 72

Introduced by the Senate Judiciary Committee on behalf of the Board, this bill is something of a catch-all for gaming law updates.

Sports wagering ticket brokers and table games

Initially, this bill was intended to introduce enabling legislation for the Commission to

promulgate regulations for sports wagering ticket brokers. Per Member Terry Johnson, however, after continued research and discussion the Board has decided that further study is necessary to determine the correct regulatory structure for sports wagering ticket brokers. According to Member Johnson, the Board has also pulled the proposed definition of the term “table game” from this bill because “with many licensees offering hybrid options among table games and card games, the Board wants to continue to study this issue before defining the term in statute.”

Changes impacting gaming employees

Several sections of this bill deal with gaming employee issues. One section authorizes the Board to temporarily suspend the registration of a gaming employee upon his or her arrest by an agent of the Board and requires the Commission to adopt regulations relating to such temporary registration suspensions. As explained by Member Johnson, the purpose of the bill is to address the situation where a gaming employee works at multiple establishments.

So, if an employee is arrested at one establishment, the Board wants to make sure the employee is removed from any other gaming establishments at which (s) he is concurrently employed. Although the Board does have an existing process for summary revocation of gaming registrations, this bill will allow the Board to act more nimbly.

Another section of the bill requires notification to be provided to the Board if a security guard employed by a gaming licensee switches from an unarmed to an armed position. This change will provide the Board the opportunity to review those individuals and their qualifications with a higher level of scrutiny.

Under existing law, gaming licensees must mail or deliver their employees’ completed applications for registration or renewal of registration as a gaming employee or a change of employment to the Board within five days of their receiving the completed application from the employee. This bill removes the five-business-day deadline and instead simply requires submittal of these registrations or

renewals to the Board before the employee may commence or continue to work as a gaming employee. This change reflects the fact that registration is now all done online and happens virtually instantaneously. Similarly, because fingerprints are processed electronically, the Board no longer needs two sets of fingerprints from gaming employee applicants. However, the bill allows for the Board to collect the actual cost incurred by the Board as the fee for processing the application (up to USD\$75). Finally, the bill also amends NRS 463.337 to clarify that theft may be a basis for revocation of a gaming employee registration or Board objection to such registration.

Changes regarding approvals

Senate Bill 72 addresses approval processes, clarifying that once a licensee has an approval from the Commission or the Board, that approval is revocable and no rights vest with the licensee. Current statutes make this clear regarding Commission approvals, but because the Board also grants certain administrative approvals, it is important to clarify that the same provisions apply to approvals by the Board.

Another section of this bill would remove the dual system of approval for new games. Presently, new games undergo an investigation by the Board and then must obtain Commission approval. The intent of this section is to administratively streamline this process. Per testimony by Member Johnson, the Board is still hammering out the details on this section to see if they will want to go forward with this change at this time.

Live Entertainment Tax issues

A couple of sections of this bill deal with the Live Entertainment Tax (“LET”) in Nevada. This is a tax collected on receipts for admissions to live entertainment events. This tax is collected by the Board for events conducted on the premises of gaming licensees (and by the Department of Taxation for events conducted elsewhere). Previously, the Board required licensees

to record and report certain sales in an area subject to the LET tax. With a recent transition to an admissions-based LET, however, the Board no longer needs to evaluate those sales. This change is intended to provide some regulatory relief and will provide more consistency with how the Nevada Department of Taxation collects LET.

Allowing certain equipment to be moved off-premises

This bill eliminates the requirement that cashless wagering systems be physically located and operated in-house by a gaming licensee. This change is in recognition of the fact that there is an increase in non-licensees providing these services to the gaming industry. It is important to note that the Board will still have full access to inspect and access those records. Similarly, this bill also authorizes the Commission to adopt regulations that will allow associated equipment to be located at a hosting center (again, this will not limit the Board’s right to inspect and access this equipment).

Open Meeting Law issues

Although the Board is a public body, subject to Nevada’s Open Meeting Law statute (“OML”), it also has certain investigative, law enforcement and other regulatory responsibilities that may require some discretion. This bill provides that the OML does not apply to an interpretation by the Board of any provision of Title 41 of NRS or any regulations promulgated thereunder or to the applicability of any federal or state law or regulation to any provision of Title 41 of NRS or any regulations promulgated thereunder.

This bill also clarifies that the OML does not apply to a determination by the Board to issue an industry notice concerning such interpretations. This will enhance communications between the Board and the industry it regulates by allowing the Board to provide information and guidance more expeditiously without fear it will run afoul of the OML.

Finally, existing law provides that the OML does not apply to any action or proceeding of the Board that is related to

making a determination as to whether, one, certain violations have occurred, or two, to file certain complaints with the Commission. Such provisions are scheduled to expire by limitation on May 30, 2019. This bill removes that expiration date, thereby extending indefinitely the exemption from the Open Meeting Law for such actions or proceedings of the Board.

Senate Bill 73

Introduced by the Senate Judiciary Committee on behalf of the Board, this bill will move the definition of “mobile gaming” from inclusion as a category for non-restricted gaming licenses into the current definition of “gaming device”. In Nevada, “mobile gaming” is when customers use a mobile device to gamble within a licensed gaming establishment (not internet gaming).

This bill will make mobile gaming subject to the same regulation and control as other gaming devices. Per Chair Morgan’s testimony, there are currently about 4-5 licensees with this mobile gaming license who may be impacted by this change. At least one of these is working with the Board on amendments, with the likely goal to clarify its ability to keep its non-restricted gaming license (which is required as a predicate to its sports pool licenses in Nevada) when mobile gaming is no longer a separate category of non-restricted gaming license.

Senate Bill 46

Regulation of Tout Providers, “public access” definition change, and registration of Interactive Gaming Service Providers – on hold.

Senate Bill 46, as introduced, would require the Board to regulate “tout” services in Nevada. This section, however, has been proposed to be removed to allow for “further study”. Similarly, another section, which would require the Commission to adopt regulations interpreting the terms “open to the general public” and “access of the general public to gaming activities” has also been proposed to

be removed from the bill to allow for further discussion and study. Finally, the Board was considering changing the requirements for interactive gaming service providers from full licensure to a more streamlined registration process, but that change has been proposed to be removed as well.

"Gross revenue" redefined

This bill also proposes to revise the definition of "gross revenue" in NRS 463.0161 to include cash received as entry fees for all contests or tournaments.

Authorization to intercept certain communications

Finally, this bill would amend NRS 179.460 to authorize the attorney general or district attorney of any county to apply for a court order to intercept communications during an investigation involving certain offenses relating to gaming (violations of NRS 463.160 or 465.086).

Assembly Bill 221

Assembly Bill 221 would allow adults who are 18-21 years of age to be employed as gaming employees by gaming manufacturers and distributors. This bill is supported by the industry as well as Nevada educational institutions, because it will allow these adults, who graduate from technical training programs and trade schools, to be hired in the technology sector of the gaming industry, as well as allow manufacturers and distributors to introduce internships and part-time work opportunities to these younger workers. Already, workers under the age of 21 are allowed to work in count rooms or to hold certain food and beverage positions that are not involved in conducting a gambling game or interacting with gaming patrons.

Assembly Bill 117

Existing Nevada law establishes provisions

governing lotteries, including charitable lotteries. (Chapter 462 of NRS). Existing law also establishes provisions governing charitable games, including games operated by charitable or educational organizations and charitable bingo games operated by qualified organizations. (NRS 463.409-463.40965). This bill proposes to incorporate charitable games into the provisions of law governing charitable lotteries for the purpose of treating all charitable gaming in the same manner. **CGL**

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BY KEVIN J. WEBER

Regulated Gambling Under Siege

Advertising restrictions gaining momentum worldwide

In the last twelve months, there has been an international movement towards the enactment of legislation that is broadly anti-gambling. By anti-gambling, we refer to laws that are animated by the view that regulated gambling is essentially anti-social; at best, a form of predatory capitalism, and at worst a malignant influence upon the moral fibre of the nation. In each case, the regulated gambling industry has been unable to head off this legislative trend with arguments it has used in the past to the effect that laws that prejudice regulated gambling operators will redound to the benefit of unregulated gambling. It is time for the industry to reconsider its tactics and assess whether a new government relations strategy could generate improved results.

At the furthest extreme we find Italy, which has enacted a total ban on all forms of advertising, including sponsorships that have been the lifeblood of Italian football clubs, particularly in the lower-level leagues. At the same time, tax rates on casinos and sports betting operators (land-based and online) have been increased, with plans for further increases to tax rates on video lottery terminals and slot machines. More recently, revelations that some licensed Italian bookmakers accept bets on amateur, underage athletes have led government officials to state that a total ban on amateur sports betting is being considered.

In Belgium, less restrictive measures are being imposed. Online casino ads are to be completely banned from television. Sports betting ads may only air on TV after 8 p.m., and are not allowed during live sports broadcasts. Gambling operators will no longer be permitted to endorse celebrities and athletes. Online casino companies will not be allowed to advertise their products on third-party affiliate sites. They will only be able to advertise on their own websites, and their advertisements can be removed if they

appear to be promoting excessive gambling activity (reportedly, no clear definition of what “excessive” means in this context has been provided).

The 2019 budget proposals of the minority government in Spain included proposals that would have restricted gambling advertising in a manner similar to how the advertising of tobacco products is presently restricted in Spain. Currently, tobacco brands may not enter into sponsorship agreements and may not advertise at all in large sectors of the Spanish media. While these budget proposals were defeated in parliament in February 2019, leading to calls for a new election, the fact remains that broad gambling advertising restrictions were introduced by a governing party, and the budget bill was defeated for reasons politically unconnected to its gambling-related provisions.

In the United Kingdom, the opposition Labour Party adopted a number of policies aimed at restricting the activities of regulated gambling operators at its party conference in September 2018. These included a total ban on gambling advertising during live broadcasts of sporting events, a levy on gambling operators of one per cent of gross gambling yield, new clinical guidelines and increased resources for the treatment of gambling addiction, rules that would allow gambling addicts to tell their bank to block their online gambling transactions and a ban on credit card betting. In October 2018, even more extreme restrictions were proposed by Lord Chadlington, a leading Conservative peer and donor, in alliance with members of parliament from the Labour Party, Liberal Democrat Party and Scottish Nationalist Party, as well as the Church of England.

The industry responded in December 2018 with the largest gambling operators in the United Kingdom voluntarily adopting

a ban on advertising during live sporting events broadcasts. It is unlikely that this concession will put a halt to increasing pressure to restrict the activities of regulated gambling operators, such as sponsorship bans and a more wide-ranging ban on gambling advertising.

It is notable that pressure to enact these restrictions comes from all sides of the political spectrum. The Italian deputy minister who promoted the advertising ban is the leader of the Five Star Movement, a populist and anti-establishment party. The Belgian restrictions were championed by the justice minister, who belongs to the Christian Democratic and Flemish Party, a moderate conservative party in the Christian Democratic tradition. The gambling restrictions contained in the defeated 2019 Spanish budget bill were proposed by the Spanish Socialist Workers' Party and the left-wing populist party, Podemos. Support for restrictions in the United Kingdom comes from across a wide swath of parties, including at least one Conservative member of the House of Lords.

It is apparent that the usual arguments raised by those who represent the regulated gambling industry are increasingly ineffective at communicating to office-holders or the public the potential unforeseen consequences of restricting the promotional activities of regulated gaming operators. The industry appears to have no natural allies in any political movement. A change of tactics is in order, and should be considered on an international level, since the targeting of the industry as a threat to public health has also become a contagion that crosses all borders. **CGL**

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BY MATTHIAS SPITZ

The 3rd Amendment Treaty

Another chapter in never-ending story of sports-betting regulation in Germany?

On March 21, 2019, the prime ministers of the 16 German states agreed to an amendment of the overarching regulatory framework for gambling in Germany, the Interstate Treaty on Gambling (the “Interstate Treaty”).

This amendment, the so-called 3rd Amendment Treaty, authorizes local regulators to issue new licences for retail and online sports-betting in Germany. Material restrictions to sports-betting operations, such as a limited scope of available bet types and a limits on stakes, however, remain in place. It is yet to be seen whether licensing conditions will be viable, or whether the 3rd Amendment Treaty is yet another chapter in the never-ending story that the regulation of sports-betting in Germany is.

The previous chapters tell a story of failed attempts of the German states and their state-owned lottery companies to monopolize sports-betting. Under the first Interstate Treaty of 2008, privately owned betting operations were outlawed, however, jurisprudence of the Court of Justice of the EU (the ‘CJEU’) in precedent cases *Placencia*¹ and *Gambelli*² led the state governments to conclude that the expansionist business activities of the state lotteries cannot be

reconciled with the overarching statutory objective of player protection and, hence, were legally inconsistent. As a consequence of permanent jurisprudence of the CJEU, such inconsistent restrictions contravene the market freedoms and must not be applied. Operators of sports-betting therefore can invoke the freedom of services under the EU Treaties to justify operations in the unregulated (grey) market for sports-betting in Germany. This situation persists up until today.

With another iteration of the Interstate Treaty of 2012, the monopoly in sports-betting had been abolished, but the new treaty only provided for a limited number of up to 20 licences for sports-betting. Experts had warned that the selection process for the 20 licensees was vulnerable to legal challenge. After years of litigation, the judgment of the CJEU of 2016 in case *Ince*³ suggested that the licensing process had been non-transparent, therefore violating EU, which

finally gridlocked the licensing process. No licences have been issued under the Interstate Treaty of 2012 up until today, even though 35 sports-betting companies (online and retail) have been confirmed to satisfy the licensing criteria.

Since the public tender for the 20 licences and the term of the legal basis for the licensing process were set to expire in June 2019, the prime ministers of the German states were under pressure to agree on a solution. The 3rd Amendment Treaty is the result of years of negotiations between the German states — and it may turn out to be a rather meagre result.

The amendment essentially only consists of a handful of provisions that, one, remove the limit to 20 licences for sports-betting, and two, extend the term of the legal provisions for licensing sports-betting until June 2021. This authorizes local regulators to issue a number of licences for sports-betting from January 1, 2020, onwards which, in theory,

is unlimited. Geographically, licences will be valid in the whole of Germany.

What at first glance may seem like great opportunity for sports-betting companies, may yet turn out to be another chapter in the never-ending story of the Germany regulation of sports-betting. sports-betting companies have been operating in the unregulated German market for over 20 years, which led to a sophisticated range of products that customers in Germany are used to. As an example, in-play betting on football (soccer) matches is a particularly popular betting product.

The Interstate Treaty, however, restricts "betting on occurrences during a live sports event" which can be interpreted as referring to in-play (sec. 21(4) Interstate Treaty). As an exception, bet types relating to the result of a sports event are considered to be permissible during a match. Regulators will have to clarify how exactly the legal definitions are to be interpreted in the context of the licences to be issued. From an industry perspective, a solution involving

white-listing of bet types would clearly be undesirable as it would likely lead to a very narrow range of permissible bet types which again is not viable in online betting. Further, it would significantly hamper the online betting industry's ability to creatively react to changing customer demands.

A further key restriction, the monthly 1,000 limit (CAD\$1,511) on stakes per customer, also remains in the wording of the law under the 3rd Amendment Treaty. If implemented literally, high rollers would be deterred from licensed operations and most likely move to black market operations in the online sector. In the past, the regulators had indicated during the failed licensing process that they would be willing to apply some creativity so as to soften this restriction. Whether the regulators will be willing to re-interpret the stakes limit into a deposit limit (which is the more common form of self-limitation in other regulated markets in the EU) remains to be seen.

Regulators are expected to publish licensing requirements in mid-2019.

Notwithstanding the viability of these restrictions, compliance requirements of payment services requirements and advertising partners may still force betting companies to file applications for licences in early 2020. Even though the operators applying for such licences may have to grapple with restrictions, there is a silver lining: The Interstate Treaty is set to expire in June 2021 as a whole and, according to press statements after the Conference of the Prime Ministers on March 21, they are poised to negotiate a more ambitious Interstate Treaty involving further licensing opportunities from 2021 onwards. **CGL**

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1. CJEU, judgment of November 6, 2003 in case C-243/01, Gambelli.
2. CJEU, judgment of March 6, 2007 in case C-338/04, Placanica.
3. CJEU, judgment of February 4, 2016 in case C-336/16, Ince



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